Supreme Court, U.S.
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80-1956

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. A-713

BERTIE OTIS WHIDDEN, JR.,

Appellant,

— *v.* —

THE STATE OF NEW YORK,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

JOHN S. HALL, ESQ.
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Attorneys for Appellant

Dated: May 11, 1981

QUESTION PRESENTED

Whether New York State Penal Law Section 130.25(2) violates the Equal Protection Clause of the Fourteenth Amendment because it applies solely to males.

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In The

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No. A-713

BERTIE OTIS WHIDDEN, JR.,

Appellant,

— *v.* —

THE STATE OF NEW YORK,

Respondent.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Bertie Otis Whidden, Jr., the Appellant, appeals from the final Order of the New York Court of Appeals, dated December 18, 1980, holding that Penal Law Section 130.25 does not violate the equal protection clause of the Fourteenth Amendment of the Constitution.

OPINIONS BELOW

The opinion of the New York Court of Appeals which appears in page 1 of the Appendix is reported at _____ NY2d _____ 1980, *New York Law Journal* of January 5, 1981, p. 1.

JURISDICTION

On December 18, 1980, the Judgment of the Court of Appeals of New York State affirmed the Order of the New York

Appellate Division, Third Department, dated January 4, 1980. Said Appellate Division Order affirmed the Judgment of Conviction and Order of Honorable Julian V.D. Orton, Washington County Judge, dated September 22, 1978.

A Notice of Appeal to this court was duly filed in the Washington County Clerk's Office on March 5, 1980. The Washington County Clerk then forwarded certified copies of the Notice of Appeal to the Washington County Court, the New York State Court of Appeals and the New York Attorney General on March 6, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2) because the challenged New York State Penal Law statutes were held to be valid.

QUESTION PRESENTED

Whether New York State Penal Law Section 130.25(2) violates the Equal Protection Clause of the Fourteenth Amendment because it applies solely to males and no corresponding prohibition for females exists.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

Section 1) ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 130.25 N.Y.S. Penal Law

§130.25 Rape in the third degree

A male is guilty of rape in the third degree when:

1. He engages in sexual intercourse with a female who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old.

Rape in the third degree is a class E felony.

STATEMENT OF THE CASE

The defendant-Appellant pleaded guilty to two counts of rape in the third degree (New York State Penal Law, §130.25) in full satisfaction of a seven-count Indictment (see Commitment, page A11). The plea was specifically entered pursuant to *North Carolina* vs. *Alford*, 400 US 25, consistent with the defendant's denial of committing the underlying facts of the crimes alleged. (Transcript of plea, pages A6-A7). Furthermore, prior to his plea, he reserved his right to challenge the constitutionality of the Penal Law section involved. (Transcript of plea, page A7). This was agreed to by the District Attorney (page A6).

Following his guilty plea, the defendant was released on bail to perfect his appeal and has been free on bail from that time until the matter was decided by the New York State Court of Appeals on December 18, 1980. By Order of Judge Jacob Fuchsburg, Associate Judge of the Court of Appeals of the State of New York, the defendant was released on bail on February 5, 1981, pending the granting of a stay by this Court. The defendant is presently on bail by the Order of Mr. Justice Thurgood Marshall, dated February 27, 1981 for the pendancy of this appeal.

The sole question before this court is one of law. The attorneys for the defendant and prosecution, as well as all of the judges that have had occasion to consider this matter, have agreed that the New York Penal Law does make a distinction based on gender. The courts below have found that this gender-based distinction is supported by sufficient justification to withstand equal protection analysis. The only question on this Appeal is whether the challenged statute is unconstitutional in that it violates the Equal Protection Clause of the 14th Amendment.

THE QUESTION IS SUBSTANTIAL

This Appeal raises a substantial question. The question is a substantial one to the Appellant because unless this Appeal is heard by this Court and decided in his favor, he will be returned to prison to serve out his term. It is a substantial question to the People of the State of New York and to the People of the United States of America in that it is a question of national importance which should be decided by this Court.

Although there has been a recent case before this Court involving the same area of law involved in this Appeal, the decision in that case, *Michael M.* v. *Sonoma County*, ____ US ____, Index No. 79-1344, decided on March 17, 1981, does not decide the issues raised by this Appeal for the following reasons:

1) THE FACTS ARE DIFFERENT.

The California case involved a forcible rape. Significantly, the plurality opinion in *Michael M.* v. *Sonoma County*, supra, refers to this fact on the first page of its decision. "After being struck in the face for rebuffing Petitioner's initial advances, [the victim] . . . submitted to sexual intercourse with Petitioner." *Michael M.* v. *Sonoma County*, supra, page 4. Although the charge was for unlawful intercourse, a statutory offense, the use of force should not have been and was not ignored by this court. Each of the judges made clear in their several opinions that they found the fact of force significant, if not controlling.

In contrast, the case at bar involves a purely statutory offense. The defendant here entered a plea of guilty prior to trial to an offense not involving the use of force. Furthermore, that plea was made pursuant to the rule of *North Carolina* v. *Alford*, 400 US 25, whereby the defendant made no factual admissions. The defendant entered this plea specifically reserving his right to challenge the constitutionality of the statute involved and was admitted to bail to do so.

Because of these factual differences, the reasoning used in the plurality opinion cannot be applied to the present case.

That opinion holds that a gender-neutral statute would be incapable of enforcement. It reasoned persuasively that a female would be unlikely to report a violation of the statute where she would become subject to criminal prosecution.

That reasoning doesn't control the case at bar. Where, as here, there is a purely statutory offense without the use of force, it is unlikely that the female would report the violation of a statute whether it be gender-based or otherwise. A female is not likely to report a sex act that she willingly consented to. Consequently, the New York Statute, unlike the California statute, cannot be justified on the basis that it would otherwise be burdensome or impossible to enforce.

2) THE LAWS ARE DIFFERENT.

a) The New York Statute specifically prohibits "males" over 18 years from having sex with females under age 17. The California statute prohibits "a perpetrator" (see page A47) of either sex from engaging in sex with females under age 18. A "perpetrator" can be of either sex while the New York language is unambiguously discriminatory. The California statute applies to both sexes and consequently does not discriminate in violation of the Equal Protection clause. The New York Statute clearly does.

b) California criminal practice allows the jury to consider mitigating circumstances because it requires that the "jury shall recommend . . . the punishment" California Penal Code §264 (see page A47). Furthermore, because the jury has discretion in recommending whether there shall be imprisonment or state prison, there is flexibility in determining whether the defendant's acts constitute a felony or a misdemeanor. California Penal Code §17(b) (page A48). Thus, California procedure prevents its statute from being applied overbroadly or with unwarranted severity.

New York criminal practice allows neither consideration in mitigation nor an affirmative defense where extenuating circumstances are present. Furthermore, a jury's determination

that a male over 18 years has engaged in sex with a female under age 17 years designates the defendant as a felon in *all* instances. It is absolutely immaterial that birth control was employed, that either party was infertile, that the prosecutrix was unchaste or promiscuous, that the defendant took diligent steps to determine the age of the prosecutrix, that she used fraudulent age identification or even that actual force and duress was used by the prosecutrix.

Because of this inflexibility, the New York Statute is unconstitutionally overbroad. No mechanism exists to differentiate among various factual situations as there are in California.

3) THE ISSUES ARE DIFFERENT.

a) This court did not consider the effect of birth control usage in *Michael M.* v. *Sonoma County*, supra. If it had, it would not have found that the prohibition of intercourse has a substantial relationship to the prevention of teenage pregnancies. The issue of the incidence of birth control usage for minor females in California was never raised.

The New York State Department of Public Health indicates that the incidence of birth control usage by young females in New York is substantial. Therefore, the New York statute in question lacks even a minimum rational relationship to its announced purpose of prevention of "premature parenthood". *People* v. *Whidden*, ____ NY ____ (page A24).

Since a substantial number of young New York State women employ birth control, the statute is overly broad in punishing the male where pregnancy will not result due to infertility or use of contraception. Furthermore, it denies Equal Protection by punishing the male but not the female participant.

b) The challenged New York Statute is unconstitutional for a reason not apparently argued or considered in the *Michael M.* case. It is respectfully submitted that under the New York "Statutory Rape" Statute, challenged in this Appeal, the results in a given case might well shock the conscience of the court

even under the reasoning of the plurality. Not only does the New York Statute authorize punishment of only one of two equally guilty wrong-doers, but under the New York Statute a male must be branded a felon and in some cases given a mandatory sentence in prison even though the trier of the fact found that he had committed no crime whatsoever. For example, a male who came to court and admitted intercourse but asserted that he was not the aggressor and in fact was a completely unwilling participant. The California Statute in such a situation gives the trier of the fact the option to find a lesser crime but under the New York Statute a judge faced with this factual situation would have no choice but to brand the male as a felon and in some cases would be absolutely bound by the law to send him to prison. Although the ancient and honorable doctrine of *Mens Rea* has been somewhat hedged about and diluted, it is respectfully submitted that the New York Statute on its face is not only violative of the Equal Protection Clause but will in many instances be Draconian in result and work such gross injustice as to be unconstitutional for that reason.

Dated: May 11, 1981

Respectfully submitted,

JOHN S. HALL, ESQ.
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(518) 668-5489

Attorneys for Appellant

APPENDIX

INDICTMENT.

SUPREME COURT STATE OF NEW YORK
COUNTY OF WASHINGTON

.....

THE PEOPLE OF THE STATE OF NEW YORK

— against —

BERTIE OTIS WHIDDEN, JR.

.....

SEPTEMBER 1977 TERM
Indictment #2513

THE GRAND JURY OF THE COUNTY OF WASHINGTON, by this indictment, accuse the defendant, Bertie Otis Whidden, Jr., of the crime of RAPE IN THE SECOND DEGREE, in violation of Section 130.30 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Washington, on or about the 19th day of May, 1977, then being a male eighteen years old or more, to wit: twenty-seven years of age, engaged in sexual intercourse with Melodie Lynne Petty, a female who was at the time less than fourteen years old, to wit: twelve years of age.

SECOND COUNT:

AND THE GRAND JURY, aforesaid, by this indictment, further accuse the defendant, Bertie Otis Whidden, Jr. of the crime of RAPE IN THE THIRD DEGREE, in violation of Section 130.25(2) of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Washington, on or about the 22nd or 23rd day of May, 1977, then being a male twenty-one years old or more, to wit: twenty-seven years of

age, engaged in sexual intercourse with Evelyn Carmella Cutter, a female who was at the time less than seventeen years old, to wit: fourteen years of age.

THIRD COUNT:

AND THE GRAND JURY aforesaid, by this indictment, accuse the defendant, Bertie Otis Whidden, Jr., of the crime of RAPE IN THE SECOND DEGREE, in violation of Section 130.30 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Washington, sometime between May 20, 1977 and June 9, 1977, then being a male eighteen years old or more, engaged in sexual intercourse with Melodie Lynne Petty, a female who was at the time less than fourteen years old, to wit: twelve years of age.

FOURTH COUNT:

AND THE GRAND JURY aforesaid, by this indictment, further accuse the defendant, Bertie Otis Whidden, Jr., of the crime of RAPE IN THE THIRD DEGREE, in violation of Section 130.25(2) of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Washington, sometime between May 24, 1977 and June 9, 1977, then being a male twenty-one years old or more, engaged in sexual intercourse with Evelyn Carmella Cutter, a female who was at the time less than seventeen years old, to wit: fourteen years of age.

FIFTH COUNT:

AND THE GRAND JURY aforesaid by this indictment, accuse the defendant, Bertie Otis Whidden, Jr., of the crime of RAPE IN THE SECOND DEGREE, in violation of Section 130.30 of the Penal Law of the State of New York, committed as follows:

INDICTMENT.

The said defendant, in the County of Washington on or about the 10th day of June, 1977, then being a male eighteen years old or more, to wit: twenty-eight years of age, engaged in sexual intercourse with Melodie Lynne Petty, a female who was at the time less than fourteen years old, to wit: twelve years of age.

SIXTH COUNT:

AND THE GRAND JURY aforesaid, by this indictment, further accuse the defendant, Bertie Otis Whidden, Jr., of the crime of RAPE IN THE THIRD DEGREE, in violation of Section 130.25(2) of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Washington, on or about the 10th day of June, 1977, then being a male twenty-one years old or more, to wit: twenty-eight years of age, engaged in sexual intercourse with Evelyn Carmella Cutter, a female who was at the time less than seventeen years old, to wit: fourteen years of age.

SEVENTH COUNT:

AND THE GRAND JURY aforesaid, by this indictment, further accuse the defendant, Bertie Otis Whidden, Jr., of the crime of UNLAWFULLY DEALING WITH A CHILD, in violation of Section 260.20(4) of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Washington, on or about the 19th day of May, 1977, gave an alcoholic beverage to a child less than eighteen years of age, to wit: the said defendant gave Evelyn Carmella Cutter, fourteen years of age,

and Melodie Lynne Petty, twelve years of age, a quantity of wine.

s/ Thomas E. Mercure
District Attorney of Washington County

s/ Joseph Barnes
Foreman

EXCERPT FROM TRANSCRIPT OF PLEA.

STATE OF NEW YORK
COUNTY COURT COUNTY OF WASHINGTON

THE PEOPLE OF THE STATE OF NEW YORK

against

BERTIE O. WHIDDEN, JR.,

Defendant.

September 11, 1978
Salem, New York

PRESENT: Hon. Julian V.D. Orton
County Judge

APPEARANCES:

Thomas Mercure, Esq., District Attorney for Washington County representing The People of the State of New York

John Hall, Esq., by H. Bartlett McGee, of counsel, attorneys for defendant

Defendant in person

Leon Putnam, Clerk of the Court

EXCERPT FROM TRANSCRIPT OF PLEA.

DISTRICT ATTORNEY: Your Honor, this is the case of The People of the State of New York against Bertie Otis Whidden, Jr. Mr. Whidden is present in person before the Court. His counsel is John Hall of Warrensburg, and Bart McGee is of counsel to Mr. Hall and is present in the courtroom today. Your Honor, Mr. Whidden stands charged with three counts of rape in the second degree, three counts of rape in the third degree, and one count of unlawfully dealing with a child. He has previously entered a plea of not guilty to this indictment. It is my understanding, Your Honor, that the defendant is prepared to withdraw his plea of not guilty previously entered and enter a plea of guilty to the first count of the indictment reduced to rape in the third degree.

THE COURT: That is which count?

DISTRICT ATTORNEY: The first count reduced to rape in the third degree, and the second count, which is a count of rape in the third degree. The first count and the second count, Your Honor, the first count reduced to rape in the third degree and the second count, which is rape in the third degree, in full satisfaction of the indictment. I would like the record to indicate, Your Honor, that several motions have been made during the course of the past year with reference to this case including a motion to suppress a confession and certain admissions and a motion to dismiss all of the counts of rape based upon the fact that they are unconstitutional. It is my understanding that it is the defendant's intention to appeal this matter after he pleads guilty, namely, with reference to the constitutionality of the statute. We understand that. I would further point out that it is my understanding that he is willing to plead guilty to the first count pursuant to *Alford* vs *North*

Carolina, that he is not going to make any admissions with reference to the underlying facts of the first two counts of the indictment, and we further have no objection to that.

Now, the defendant is pleading guilty, Your Honor, with the understanding that the Court would impose a sentence of one and a half to three years. I would further want the record to indicate that I have an understanding with Mr. Hall that after sentencing the defendant will remain free on $7,500 bail pending the outcome of his appeal. This sets forth my understanding, Your Honor, of the entire situation.

MR. McGEE: May I briefly be heard, Your Honor? I am of counsel to Mr. Hall who is the attorney of record, and I have made no representation at all to Mr. Whidden regarding this plea bargaining agreement. I am simply here today for the formality of either pleading or putting the matter over to the Trial Term, but I want to make it clear that the sentence that will be imposed will be concurrently, is that correct, Tom?

DISTRICT ATTORNEY: Yes, that's correct, one and a half to three on each count to run concurrently with one another is our understanding, yes.

MR. McGEE: And, further that it is not part of this arrangement that the defendant waive any of his rights to appeal. In other words, all his appellate rights will remain intact. You indicated that it will be primarily from the constitutionality, but I understand it will be from the entire thing.

DISTRICT ATTORNEY: Any issue you want to raise on appeal he has the right to do.

MR. McGEE: As indicated to the Court I have made no representation to Mr. Whidden other

than setting forth the agreement I understand Mr. Hall made with the District Attorney's office, and at this time if the Court wants to adjudge regarding that matter I will sit here and listen.

THE COURT: Mr. Whidden, do you follow this?

DEFENDANT: Yes, I understand it fully.

THE COURT: In other words, the offer being made that you will withdraw your prior plea of not guilty and at this time plead guilty to the first count as reduced from rape in the second degree to rape in the third degree, and also to the second count of the indictment which does charge you also with rape in the third degree, and with the acceptance of those pleas that would be in full satisfaction of all the counts set forth in the indictment. Do you understand?

DEFENDANT: Yes, Your Honor, I understand.

THE COURT: And, how do you plead to those two charges, that is rape in the third degree under the first count as reduced and rape in the third degree under the second count as reduced -- no, as charged, guilty or not guilty?

DEFENDANT: I would plead guilty.

THE COURT: Guilty to both those counts?

DEFENDANT: Yes.

THE COURT: In connection with your plea I will ask you a number of questions. First of all,

are you pleading as you are at this time voluntarily and of your own free will?

DEFENDANT: Yes.

THE COURT: Has any coercion, threats, or pressure of any kind been used upon you in any way by any person or persons to induce you to change your former plea of not guilty to your pleas of guilty at this time?

DEFENDANT: No.

THE COURT: Do you know and understand that your pleas of guilty are a confession of guilt as to the crimes that you have plead guilty to?

DEFENDANT: Yes.

THE COURT: You understand also by entering a plea of guilty you are waiving your right to a trial by jury under the indictment?

DEFENDANT: Yes, I understand that.

THE COURT: Do you understand that punishment can be imposed by the Court including incarceration in a correctional facility?

DEFENDANT: Yes, Your Honor.

THE COURT: I also advise you that if the crimes to which you have plead guilty are ones for which additional punishment is prescribed by reason of the fact that you have previously been convicted of a felony crime that the punishment you might receive in that instance would be greater than it would have been had you not been so previously convicted.

DEFENDANT: Yes.

EXCERPT FROM TRANSCRIPT OF PLEA.

THE COURT: In any event, I believe through discussions between counsel and the District Attorney that a fixed sentence has been arrived upon, has been set forth at this time, in the event that it reaches that point, of one and a half to three years. Do you understand it?

DEFENDANT: Yes, sir.

THE COURT: Is there anything about your pleas that you would like to ask any questions at this time?

DEFENDANT: Not at this time, Your Honor.

THE COURT: Do you feel that you have understood the questions I have put to you at this time?

DEFENDANT: Yes, I understand everything fully.

THE COURT: There is nothing further that you wish to set forth then?

DEFENDANT: Not at this time.

COMMITMENT.

COMMITMENT TO
THE STATE DEPARTMENT OF CORRECTIONAL SERVICES

FILED
Dec 26 2 21 PM '80

At a term of the County Court of Washington County, held in and for the County of Washington in the Court House in Salem, New York, on the 26th day of December 1980

PRESENT:
HON. JULIAN V.D. ORTON
Judge

THE PEOPLE OF
THE STATE OF NEW YORK
against
BERTIE OTIS WHIDDEN

Indicted for Rape 2nd degree, 3 counts; Rape 3rd degree, 3 counts; Unlawfully Dealing with a child

and convicted of the crime of Rape 3rd degree (1st count reduced) & Rape 3rd degree, 2nd count of indictment

Crime committed 5/19/77; 5/22/77; 5/20/77; 6/9/77 and 6/10/77

The defendant having been found guilty ~~by verdict~~ by plea of a felony, to wit: Rape 3rd degree two counts

WHEREUPON, it is ORDERED and ADJUDGED by the Court, that the said Bertie Otis Whidden

COMMITMENT.

for the felony aforesaid whereof he is convicted by sentenced to an INDETERMINATE sentence of imprisonment which shall have a maximum term of 3 years; *(and the Court imposes a minimum period of imprisonment of 1½ years.)* It is

FURTHER ORDERED by the Court that the said defendant be committed to the custody of the State Department of Correctional Services, and he shall be delivered to the Clinton Correctional Facility at Dannemora, New York, there to be dealt with in accordance with the laws pertaining to his sentence.

A TRUE EXTRACT FROM THE MINUTES:

(SEAL)

s/ Leon D. Putnam
Signature

Washington County Clerk
Title

*N.B. Minimum period mandatory for Class "A" felony
(Optional for Class B C D felony)

DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT.

#35576

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

BERTIE OTIS WHIDDEN, JR.,
Appellant.

Argued, October 12, 1979.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ELLIS J. STALEY, JR.,
Associate Justices.

APPEAL from a Judgment of the County Court of Washington County (Julian V. D. Orton, J.), rendered September 22, 1978, convicting defendant upon his plea of guilty of two counts of rape in the third degree.

JOHN S. HALL, for appellant, 166 Main Street, Warrensburgh, New York 12885.

DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT.

THOMAS MERCURE, District Attorney, for respondent, 149 Broadway, Fort Edward, New York 12828.

OPINION FOR AFFIRMANCE

SWEENEY, J.

Defendant was charged in a seven-count indictment with three counts of rape in the second degree (Penal Law, § 130.30), three counts of rape in the third degree (Penal Law, § 130.25, subd. 2) and one count of unlawful dealing with a child (Penal Law, § 260.20, subd. 4). After his motion to dismiss the first six counts of the indictment based on the unconstitutionality of section 130.30 and subdivision 2 of section 130.25 of the Penal Law was denied, defendant pleaded guilty to two counts of rape in the third degree (Penal Law, § 130.25) in full satisfaction of the indictment. This appeal ensued.

No factual issues are presented on this appeal. Section 130.30 of the Penal Law provides that "[a] male is guilty of rape in the second degree, when, being eighteen years old or more, he engages in sexual intercourse with a female less than fourteen years old." Pursuant to subdivision 2 of section 130.25 of the Penal Law, "[a] male is guilty of rape in the third degree when: * * * 2. Being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old." The clear objective of these statutes is to protect young girls from the physical and psychological injuries likely to occur as a result of the commission of these offenses.

Defendant contends that the statutes are violative of the equal protection clauses of the State and Federal Constitutions since only males can be convicted of these crimes. It is argued that such gender based classifications lack sufficient justification to withstand an equal protection inquiry and are, therefore, unconstitutional. He relies principally on *Meloon* v.

Helgemoe (564 F 2d 602, cert. den. 436 U.S. 950), which invalidated a similar New Hampshire statute.

The *Meloon* case precipitated a flurry of unsuccessful challenges to the New York statutory rape statutes (*People* v. *Mndange-Pfupfu*, 97 Misc 2d 496; *People* v. *Smith*, 97 Misc 2d 115; *People* v. *Prainto*, 97 Misc 2d 66; *People* v. *Weidiger*, 96 Misc 2d 978). While we agree with the result reached in each of these cases, none appear, from our research, to have reached an appellate court. Concerning the *Meloon* case, we would note that the statute therein declared unconstitutional had been amended, prior to the disposition of the case, so as to remove the gender-based distinction. It is also noteworthy that a violation of the statutory rape statute considered in *Meloon* could occur even "in the scenario of an adolescent love tryst of a 16 year old boy and a 14 year old girl" (*Meloon* v. *Helgemoe*, *supra*, p. 608).

In order to withstand equal protection scrutiny, classifications by gender must serve important governmental objectives and also must be substantially related to achievement of such objectives (*Califano* v. *Webster*, 430 U.S. 313; *Craig* v. *Boren*, 429 U.S. 190, 197). We should also give great deference to legislative judgments concerning problems with which the State is confronted, and particularly to those involving the health, welfare and morale of infants.

The court in *Meloon* was concerned with a New Hampshire statute and its decision is not binding on this court. We are unable to accept the reasoning adopted therein. Furthermore, the United States Court of Appeals for the First Circuit, which decided the *Meloon* case, more recently upheld a Maine statutory rape statute, concluding that prevention of physical injury to young females was the principal reason motivating the legislation and the classification embodied in the statute was substantially related to achievement of this objective (*Rundlett* v.

Oliver, ____ F 2d ____, 25 Cr L 2532). In our view, the statutes in question were enacted in order to protect young females from physical and psychological injuries. Empirically, we are aware that there are greater incidents of female victims. Young female victims are more prone to physical injury than males. Significantly, only the female can become pregnant with possible physical and psychological problems resulting.

It is the opinion of this court that the gender-based classifications contained in the statutes in question herein serve important governmental objectives concerning uniquely female concerns and they are substantially related to the achievement of those objectives. Consequently, we conclude that section 130.30 and subdivision 2 of section 130.25 of the Penal Law are not unconstitutional as violative of the equal protection clauses of the State and Federal Constitutions.

The judgment should be affirmed.

ORDER OF APPELLATE DIVISION, Third Department, Affirming Order of Lower Court.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 9th day of October, 1979.

PRESENT: HON. A. FRANKLIN MAHONEY,
Presiding Justice

HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ELLIS J. STALEY, JR.,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- against -

BERTIE OTIS WHIDDEN, JR.,
Appellant.

COUNTY CLERK'S INDEX NO.
INDICTMENT #2513

Bertie Otis Whidden, Jr., having appealed from a judgment of conviction of the County Court of Washington County, rendered on the 22nd day of September, 1978, and said appeal having been presented during the above stated term of this Court, and having been submitted by John S. Hall, Esq., of counsel for appellant, and by Thomas E. Mercure, Esq., of

ORDER OF APPELLATE DIVISION, Third Department, Affirming Order of Lower Court.

counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 27th day of December, 1979, it is hereby

ORDERED that the judgment so appealed from, be and hereby is, affirmed and matter remitted to the County Court.

ENTER

/s/ John J. O'Brien
Clerk

Dated and Entered: January 4, 1980.

A TRUE COPY

s/ John J. O'Brien, Clerk

ORDER OF APPELLATE DIVISION, Third Department, Granting Leave to Appeal to the Court of Appeals.

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

BERTIE OTIS WHIDDEN, JR.,

Defendant.

ORDER
35576

An application having been made by defendant for a certificate, pursuant to section 460.20 of the Criminal Procedure Law, granting permission to appeal to the Court of Appeals from an order of the Appellate Division, Third Judicial Department, entered January 4, 1980, which affirmed the conviction;

NOW, on reading and filing the notice of application by John S. Hall, Esq., dated February 4, 1980, and no papers having been submitted in opposition thereto, it is hereby

ORDERED that the application be and the same hereby is granted, and it is hereby certified that the case involves a question of law which ought to be reviewed by the Court of Appeals.

DATED: March 10, 1980

/s/ Michael E. Sweeney
Associate Justice
Appellate Division
Third Judicial Department

ORDER OF APPELLATE DIVISION, Third Department, Granting Leave to Appeal to the Court of Appeals.

APPELLATE DIVISION-SUPREME COURT-
THIRD DEPARTMENT
STATE OF NEW YORK

I, JOHN J. O'BRIEN, Clerk of the Appellate Division of the Supreme Court, Third Judicial Department, do hereby certify that I have compared this copy with the (illegible)
filed in said office on March 10, 1980 that the same (illegible) transcript thereof, and of the whole said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed seal of this Court on March 11, 1980.

s/ John J. O'Brien

OPINION OF THE NEW YORK COURT OF APPEALS.

State of New York
Court of Appeals

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3 No. 485
The People &c.,
Respondent,
v.
Bertie Otis Whidden, Jr.,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(485) John S. Hall, Warrensburg, for appellant.
Thomas E. Mercure, DA,Washington County, for respondent.

WACHTLER, J.

The defendant pleaded guilty to two counts of rape in the third degree (Penal Law § 130.25) in full satisfaction of a seven count indictment. Prior to his plea he reserved his right, on this appeal, to challenge the constitutionality of the so-called statutory rape laws claiming them to be gender based and violative of equal protection in that they unlawfully discriminate against males.

There is no dispute as to the underlying facts and the language of the statute being challenged is clear. Section 130.30 of the Penal Law provides that "[a] male is guilty of rape in the second degree when, being eighteen years old or more, he engages in sexual intercourse with a female less than fourteen

years old." Subdivision 2 of section 130.25 of the Penal Law provides that "[a] male is guilty of rape in the third degree when *** 2. being twenty-one years old or more he engages in sexual intercourse with a female less than seventeen years old."

The defendant argues that because only males can be convicted of these crimes, the statutes are violative of the equal protection clauses of the State and Federal Constitutions. It is contended that this distinction based on gender is not supported by sufficient justification to withstand equal protection analysis and that, therefore, the statutes are unconstitutional.

Recognizing the fact that it is statutory rape for an eighteen or twenty-one year old male to have sexual intercourse with a consenting female under the ages of fourteen or seventeen respectively, while it would be no more than the lesser crime of sexual abuse for an adult female to have normal sexual intercourse with a male less than sixteen years of age, we conclude that a gender classification does exist. Only a male can be convicted as a principal actor under statutory rape laws. Indeed, it was because of this gender based classification that the United States Court of Appeals for the First Circuit struck down as unconstitutional the statutory rape statute then in effect in New Hampshire (*Meloon* v *Helgemoe*, 564 F2d 602, cert den 436 US 950). In that case, the New Hampshire District Court noted (436 F Supp 528,532) that "there is no valid reason for singling out the male for criminal treatment where the act is consensual." But the mere existence of gender classification does not, standing alone, render a statute unconstitutional.

In evaluating whether a statute violates the equal protection clause a court normally applies a "rational basis" test to determine whether the varied treatment of separate classifications of citizens "rests on grounds wholly irrelevant to the achievement of the State's objective" (*McGowan* v *Maryland*, 366 US 420,425). Where a statute's application differentiates

on the basis of race, alienage or nationality, however, the classification is deemed suspect and a strict scrutiny test must be applied to determine whether the challenged law is "necessary to promote a compelling governmental interest" (*Shapiro* v *Thompson*, 394 US 618,634).

Between those two tests, a third has developed to evaluate a constitutional challenge to a gender based statute which "must serve important governmental objectives and must be substantially related to achievement of those objectives" (*Craig* v *Boren*, 429 US 190,197; see, *Califano* v *Webster*, 430 US 313, 316-317). It is this test which becomes the focal point of our inquiry.

The State has advanced three distinct legislative justifications for penalizing males for the commission of acts which would not be criminal if committed by a similarly situated woman: preventing psychological injury to emotionally immature girls, preventing physical damage and, finally, preventing the deleterious consequences of pregnancy in minors. The first of these claimed justifications, protecting young females from psychological harm, must be rejected as a suitable ground for the gender based classification embodied in sections 130.25(2) of the Penal Law, since it is rooted in the unfounded assumption that underage women are more vulnerable to emotional harm than are their male counterparts. Such an " 'archaic and overbroad' generalization" (*Craig* v *Boren*, 429 US 190,198, supra, quoting *Schlesinger* v *Ballard*, 419 US 408,508), which is evidently grounded in longstanding stereotypical notions of the differences between the sexes, simply cannot serve as a legitimate rationale for a penal provision that is addressed only to adult males.

On the other hand, the problem of early pregnancy provides an ample justification for the Legislature's decision to deter sexual contact between older males and teenage girls by imposing criminal sanctions. The unique vulnerability of young

women in this area requires no empirical support, and a statute tailored to discourage sexual contact between fertile, underaged females and older men certainly can be viewed as one substantially related to the "important governmental objective" of preventing the deleterious economic social and psychological consequences of premature parenthood. Of course, it may be argued that Penal Law § 130.25(2) is under-inclusive in that it does not penalize sexual contact between young females and teenage boys, although such contact is just as likely to lead to unwanted pregnancy as is the prohibited conduct. This obvious under-inclusiveness, however, is not objectionable in the present case, since it may be justified as a societal decision not to impose penal sanction upon those who are not yet capable of exercising mature judgment.

There remains to be discussed the required degree of proof that the justifications for these laws were actually on the mind of the Legislature when the statutes in question were enacted or consciously retained in the law. The First Circuit case of *Meloon* v *Helgemoe* (*supra*) case perilously close to requiring that New Hampshire support its statute by production of actual legislative history indicating the purposes for its enacment (564 F2d 602,607, *supra*). This approach is ill-advised, and perhaps dangerous, for two reasons.

First, a policy of sole reliance on a search for legislative history when determining whether to void a statute, is at best a hazardous business. To be sure, legislative history is extremely valuable to sound decision making when the issue is merely statutory construction. But, it is another matter entirely to place undue reliance on legislative history in determining whether to strike down legislation which, on its face, indicates that it was enacted for a valid purpose. There is little question that what motivates one legislator to propose or make a speech urging the passage of a statute is not necessarily what motivates

scores of others to enact it (*United States* v *O'Brien*, 39 US 367, 383-384). Furthermore, it would be anomalous to strike down statutes on a rationale which implicitly admits that the very same legislation could be immediately reenacted on the basis of an explanation more perceptive than that which was originally offered.

Secondly, it is certainly illogical to require the production of legislative history documenting the underlying purpose for enactment or retention of a statute where, perhaps due to the statute's immutably sound basis, no such legislative history exists. To impose such an unreasonable burden on the respondents in this case would risk invalidation of prudent legislation whenever a litigant-challenger suggests a conceivable legislative objective which might possibly run afoul of some constitutional provision, (see, *McCray* v *United States*, 195 US 27,56). Therefore, where, as here, the legislation is supported by unrefuted, plausible and constitutionally sufficient justifications, a healthy recognition of the limits of judicial power compels the conclusion that the challenge to that legislation must be rejected (see, *McCray*, *supra* at 54-56).

Accordingly, the order of the Appellate Division should be affirmed.

OPINION OF THE NEW YORK COURT OF APPEALS.

People v Whidden
Case #485

MEYER, J. (dissenting)

Respectfully, I dissent. My disagreement is not with the presence or absence of explicit legislative history supporting what is concluded to have been the motivation for enactment of Penal Law, §§130.25(2) and 130.30, for I tend to agree with Judge Campbell, concurring in *Rundlett* v *Oliver* (607 F2d 495, 504), that the issue is whether there is *now* a proper relationship between the enactment and its objective rather than whether there necessarily *was* when it first came into our law, and with Judge Bownes, dissenting in the same case (607 F2d at p 505), that much that passes for legislative history in equal protection analysis is simply a derivation, or as he put it an "attribution", of what the writer concludes must have been the motivation in light of the mores at the times the provision was enacted and amended. Nor do I disagree with the use of the *Craig* v *Boren* (429 US 190, 197) and *Califano* v *Webster* (430 US 313, 316-317) "intermediate scrutiny" test which requires that statutory classifications be *substantially* related to an *important* governmental objective, rather than the lesser *rational* relationship to a *permissible* objective test or the more stringent strict scrutiny test which turns constitutionally on whether there is a *necessary* relationship to a *compelling* state interest. My point of departure is that without supporting data (whether in the form of legislative history or of a Brandeis brief), I do not find a substantial relationship.

What we deal with here are penal statutes that make felons out of males 21 or older who have consensual sexual intercourse with females 14 to 16 years old (Penal Law, §130.25[2]) and males 18 or older who have consensual sexual intercourse with females 11 to 13 years old (Penal Law, §130.30), but make it

only a misdemeanor for a female 21 or older to have consensual sexual intercourse with a male 14 to 16 years old (Penal Law, §130.55) or for a female 18 or older to have consensual sexual intercourse with a male 11 to 13 years old (Penal Law, §130.60). The bases for doing so are said to be, first, that a significant number of females less than 17 years old suffer inordinate physical and psychological harm as a result of consensual sexual intercourse with older persons of the opposite sex, and, second, the need to protect young females, as well as society from the burdens of unwanted pregnancy.

It may be that the physical and psychological harm suffered by females under 17 years of age is greater than the corresponding harm suffered by their male counterparts. But the aberrational desire of adults to have sexual relations with children (known as pedophilia) is not peculiar to males or directed solely at females (Eidson, The Constitutionality of Statutory Rape Laws, 27 UCLA LR 757, 774), and with an upper limit of 16 years there is substantially less likelihood of physical danger to the victim than were the age limit lower (Ploscowe, Sex and the Law, 184; Eidson, *supra* at pp 774-775).[1] Absent statistical support, I cannot conclude that relationship to either psychological or physical injury has been demonstrated to be sufficiently substantial to uphold the classification. To do so is, in effect, to embrace the moral viewpoint that girls, but not boys, need to be protected from their own inclination to enter into consensual sexual relationships with adults of the opposite sex.

---

1. The conclusion is supported by the fact that the 1950 census showed that six percent of the females in the United States were married by age 16 (United States Census 1950, Special Reports: Marital Status, table 5, p 42, cited in Myers, Reasonable Mistake of Age: A Needed Defense to Statutory Rape, 64 Mich LR 105, 121, n 112).

Yet this very day we have declared, "[I]t is not the function of the Penal Law in our governmental polity to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values" (*People* v *Onofre*, ____ NY2d ____, n3).

The same result follows when the question is examined in terms of protection from unwanted pregnancy. Though Penal Law, §130.20 makes it only a misdemeanor for a male age 16 to 20 to have consensual sexual intercourse with a female 14 to 16 years old and for a male age 16 and 17 to have consensual sexual intercourse with a female 11 to 13 years old, it is under §§ 130.25 and 130.30 a felony for a male 21 or over to have consensual intercourse with a female 14 to 16 years old and for a male 18 or over to have consensual intercourse with a female 11 to 13 years old. In the absence of any data indicating that teenage pregnancy results to a significant extent from sexual liaisons between young girls and older men, rather than between young girls and their teenage contemporaries, it cannot be maintained that the imposition of felony punishment upon a limited class of older males meets the "substantial relationship" requirement. The majority's assumption that such a demonstration is unnecessary in effect, once again, expresses a moral point of view.

Concededly there are decisions in a number of other states upholding statutory rape statutes against equal protection attack, one of which, *Michael M.* v *Superior Court of Sonoma County* (25 Cal 3d 608), has just been argued before the United States Supreme Court as this is written, but in my view logic does not support the gender-based differentiation made by the sections of the Penal Law in question.[2] Moreover, so to

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2. At least 39 states have so concluded, enacting gender neutral statutory rape laws (see Eidson, *op cit supra* at 765, n 50).

hold breaks no new ground (see *Meloon* v *Helgemoe*, 564 F2d 602, *cert den* 436 US 950 [striking down New Hampshire statutory rape provisions as violative of equal protection]; see also, *Commonwealth* v *MacKenzie*, 334 NE2d 613 [Mass] [striking down as violative of equal protection law holding father but not mother criminally responsible for birth of illegitimate child]; *Commonwealth* v *Staub*, 337 A2d 258 [Pa] [striking down as violative of equal protection law making father liable for larger fine than mother upon conviction of fornication resulting in birth of child]). I would, therefore, reverse defendant's conviction, grant the motion to dismiss the counts of the indictment charging rape in the second and third degrees, and remand the case for further proceedings on the indictment.

* *

Order affirmed. Opinion by Wachtler, J. All concur except Meyer, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

Decided December 18, 1980

ORDER OF THE NEW YORK COURT OF APPEALS.

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 485

The People &c.,

Respondent,

v.

Bertie Otis Whidden, Jr.,

Appellant.

FILED & ENTERED
DEC 30 1 13 PM '80

The appellant(s) in the above entitled appeal appeared by John S. Hall; *the respondent(s) appeared by* Thomas Mercure, District Attorney, Washington County; and Robert Abrams, Attorney General, also appeared.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Wachtler, J. All concur except Meyer, J., who dissents and votes to reverse in an opinion in which Fuchsberg, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Washington County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 18, 1980

s/ Leon D. Putnam
Clerk

ORDER OF THE SUPREME COURT OF THE UNITED STATES.

Supreme Court of the United States

No. A-713

BERTIE OTIS WHIDDEN, JR.,
Appellant

v.

NEW YORK

ORDER

UPON CONSIDERATION of the application of counsel for the appellant and of the response of the District Attorney of Washington County, New York consenting to said application.

IT IS ORDERED that the execution and enforcement of the judgment of the County Court, Washington County, New York, in the above-entitled case be, and the same is hereby, stayed.

IT IS FURTHER ORDERED that appellant be admitted to bond in the amount, terms and conditions previously set by the Honorable Julian V. D. Orton, Washington County Judge. A bond shall be posted with the Clerk of the County Court, Washington County, New York with the form and surety of such bond subject to the approval of Judge Orton or the County Court, Washington County.

This order is conditioned upon the appellant timely taking an appeal and timely filing a jurisdictional statement with this

ORDER OF THE SUPREME COURT OF THE UNITED STATES.

Court. Should the appeal not be timely taken or the jurisdictional statement not timely filed, this order shall terminate automatically. If the appeal is timely taken and the jurisdictional statement timely filed, this order shall remain in effect pending the issuance of the judgment of this Court.

/s/ Thurgood Marshall
Circuit Justice

Dated this 27th
day of February

A true copy ALEXANDER L. STEVAS
Test:
Clerk of the Supreme Court of the United States
By s/ Patricia A. Dean
Acting Deputy

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

Appeal from Judgment and Order of

STATE OF NEW YORK
COUNTY COURT COUNTY OF WASHINGTON

BERTIE OTIS WHIDDEN, JR.,

Appellant,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BERTIE OTIS WHIDDEN, JR., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final Order of the New York State Court of Appeals, entered herein on December 18, 1980, affirming the Judgment of Conviction, entered in the Washington County Court, (Judge Orton presiding), on September 22, 1978.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: March 4, 1981
at Warrensburg, New York

s/ John S. Hall
JOHN S. HALL, ESQ.

s/ John S. Hall, Jr.
JOHN S. HALL, JR., ESQ.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

JOHN S. HALL, ESQ.
JOHN S. HALL, JR., ESQ.
Attorneys for Appellant
Office & P. O. Address
170 Main Street
Warrensburg, New York 12885
Telephone: (518) 668-5489

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATE OF NEW YORK
COUNTY COURT COUNTY OF WASHINGTON

BERTIE OTIS WHIDDEN, JR.,

Plaintiff

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF WARREN)

SHARLENE TARAS, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at WARRENSBURG, NEW YORK, New York. That on the 3rd day of March, 1981 deponent served a Notice of Appeal to the Supreme Court of the United States upon JOHN D. BRIGGS, ESQ, attorney(x) for People of the State of New York in this action, at Main Street Salem, New York, the address designated by said attorney(xx) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

s/ Sharlene Taras
SHARLENE TARAS

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Sworn to before me this
3 day of March , 1981.

s/ Henry D. Sintzenich, II
Notary Public

HENRY D. SINTZENICH, II
Notary Public, State of New York
Qualified in Warren County
My Commission Expires March 30, 1982
#02S14630917

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATE OF NEW YORK
COUNTY COURT COUNTY OF WASHINGTON

BERTIE OTIS WHIDDEN, JR.,

Appellant,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF WARREN)

JOHN S. HALL, ESQ., being duly sworn, deposes and says: that he served Notice of Appeal to the Supreme Court of the United States in the above entitled action on all parties and in the manner following: That I personally filed with the County Clerk of Washington County on March 5, 1981, said Notice of Appeal, dated March 4, 1981; and that at my request, the Deputy County Clerk of the County of Washington, Dorothy Hughes, served ( ) copies of the Notice of Appeal as filed in said Clerk's Office on: Honorable John D. Briggs
Washington County District Attorney
Washington County Courthouse
Main Street, Salem, New York 12865

New York State Attorney General's Office
The Capitol, Albany, New York 12224

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street, Albany, N.Y. 12207

Clerk of the United States Supreme Court
ATT: Ms. Patricia Dean
First Street, N.E., Washington, D.C. 20543

s/ JOHN S. HALL
John S. Hall, Esq.

Sworn to before me this
12th day of March, 1981.

s/ CHRISTINE ROTHERMEL
Notary Public

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

STATE OF NEW YORK
COUNTY COURT COUNTY OF WASHINGTON

BERTIE OTIS WHIDDEN, JR.,
Plaintiff

- against -

THE PEOPLE OF THE STATE OF NEW YORK
Defendant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS.:
COUNTY OF WARREN)

SHARLENE TARAS, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at WARRENSBURG, NEW YORK, New York. That on the 3rd day of March, 1981 deponent served a Notice of Appeal to the Supreme Court of the United States upon Attorney General's Office, attorney(s) for State of New York in this action, at The Capitol Albany, New York, the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

s/ Sharlene Taras
SHARLENE TARAS

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Sworn to before me this
3 day of March , 1981.

s/ Henry D. Sintzenich, II
Notary Public

HENRY D. SINTZENICH, II
Notary Public, State of New York
Qualified in Warren County
My Commission Expires March 30, 1982
#02S14630917

AFFIDAVITS OF SERVICE OF NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

State of New York, County of Washington

AFFIDAVIT OF
SERVICE BY MAIL

DOROTHY V. HUGHES, being duly sworn, deposes and says: that she is over the age of 18 years; that she served NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon the following:

Clerk of the Court of Appeals
State of New York
Albany, N.Y. 12207

Clerk of the United
States Supreme
Court
First Street, N.E.
Washington, D.C.
20543
Att: Ms. Patricia Dean

State of New York
Office of the Attorney General
The Capitol
Albany NY 12224

Honorable John D. Briggs
District Attorney of Washington Co.
Main Street
Salem, NY 12865

on the sixth day of March, 1981

by depositing a true and correct copy of the same properly enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States at Fort Edward, New York, directed to said Offices, respectively, at said addresses, respectively mentioned above, that being the addresses within the state designated for that purpose upon the

last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.

s/ Dorothy V. Hughes
Dorothy V. Hughes

Sworn to before me, this 12th day
of March, 1981

s/ Constance J. Keays
Notary Public

CONSTANCE J. KEAYS
Notary Public, State of New York
Residing in Washington County
My Commission Expires March 30, 1982

AFFIDAVIT OF SERVICE OF APPLICATION FOR EXTENSION OF TIME.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

BERTIE OTIS WHIDDEN, JR.,
Appellant,
- against - No. A-713
NEW YORK,

STATE OF NEW YORK)
: ss.:
County of WARREN)

CHRISTINE ROTHERMEL, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at Diamond Point, New York.

That on the 11th day of March, 1981, deponent served an Application for Extension of Time to Docket Appeal upon:

John D. Briggs, Esq.
Washington County District Attorney
Washington County CourtHouse
Main Street
Salem, New York 12865

Attorney General's Office of the State of New York
The Capitol
Albany, New York 12224

at the above addresses designated by said authorities for that purpose by depositing a true copy of same, enclosed in a post-paid properly addressed wrapper, in a post office under the exclusive care and custody of the United States Post Office Department within the State of New York.

s/ Christine Rothermel
Christine Rothermel

AFFIDAVIT OF SERVICE OF APPLICATION FOR EXTENSION OF TIME.

Sworn to before me this
11th day of March, 1981.

s/ John S. Hall
Notary Public

JOHN S. HALL
Notary Public, State of New York
Qualified in Warren County
My Commission Expires March 30, 1981
#02HA4660441

SUPPLEMENTAL PAPERS

ORDER OF SUPREME COURT EXTENDING TIME.

MAR 18 1981

Supreme Court of the United States

No. A-776

BERTIE OTIS WHIDDEN, JR.,

Appellant,

v.

NEW YORK

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including April 16, 1981.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 13th day of March, 1981

NOTICE OF APPEARANCE.

Appearance and Notification Form

SUPREME COURT OF THE UNITED STATES

No. A-713

BERTIE OTIS WHIDDEN, JR.,
Appellant.

vs.

THE PEOPLE OF THE
STATE OF NEW YORK, Appellee

The Clerk will enter my appearance as Counsel for
BERTIE OTIS WHIDDEN, JR., Appellant,

who IN THIS COURT is Appellant.

I certify that I am a member of the Bar of the Supreme Court of the United States, having been admitted to practice in that court by a certificate dated October 5, 1953, under the hand and seal of the Clerk of the Supreme Court of the United States.

Signature: John S. Hall

Name: JOHN S. HALL, ESQ.
Firm: John S. Hall, Esq.
Address: 170 Main Street
Warrensburg, New York 12885
Phone: (518) 668-5489

EXCERPTS OF CALIFORNIA PENAL CODE §§ 261.5, 264.

California Penal Code §261.5:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

California Penal Code §264 (effective until January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison, provided, that when the defendant pleads guilty to an offense under Section 261.5, the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code §264 (operative January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. Rape as defined in Section 262, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison: provided, that when the defendant pleads guilty to an offense under Section 261.5 the

punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code §17(a)

"A felony is a crime which is punishable with death or by imprisonment in the State prison. Every other crime or public offense is a Misdemeanor except those offenses that are classified as infractions.

§17(b)

When a crime is punishable, in the discretion of the court by imprisonment in the State prison or by fine or imprisonment in the county jail, it is a Misdemeanor for all purposes under the following circumstances:

(1) After a Judgment imposing a punishment other than imprisonment in the state prison. . . ."